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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Communication No. 476/2011

Decision adopted by the Committee at its fifty-fourth session, 20 April-15 May 2015

Submitted by:	E.C. (represented by counsel, Mr. Christoph von Blarer of Anlaufstelle Baselland)
Alleged victim:	E.C.
State party:	Switzerland
Date of complaint:	18 August 2011 (initial submission)
Date of decision:	21 April 2015
Subject matter:	Risk of deportation to the Gambia
Procedural issues:	None
Substantive issues:	Deportation of a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture
Article of the Convention:	Article 3

[Annex]

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Annex

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (fifty-fourth session)

concerning

Communication No. 476/2011*

Submitted by:	E.C. (represented by counsel, Mr. Christoph von Blarer of Anlaufstelle Baselland)
Alleged victim:	E.C.
State party:	Switzerland
Date of complaint:	18 August 2011 (initial submission)

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 21 April 2015,

Having concluded its consideration of communication No. 476/2011, submitted by E.C. under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainant and the State party,

Adopts the following:

Decision under article 22, paragraph 7, of the Convention

1.1 The complainant, Mr. E.C., is a Gambian national born on 8 May 1979. In his communication dated 18 August 2011, [1] he claims that his deportation from Switzerland to the Gambia would constitute a violation of article 3 of the Convention against Torture. The complainant is represented by counsel.

1.2 On 7 September 2011, in application of rule 114, paragraph 1, of its rules of procedure, the Committee asked the State party not to deport the complainant to the Gambia while his complaint was being considered.

The facts as submitted by the complainant

2.1 The complainant states that he is a former soldier of the Gambian National Army. He claims to have been involuntarily involved in the coup attempt against the President of the Gambia on 21 March 2006, when he was working as a rank-and-file soldier with the job of "signalling"[2] at the presidential palace and the President was away on an official visit to Mauritania. During the attempted coup, the then Chief of

* The following members of the Committee participated in the examination of the present communication: Essadia Belmir, Alessio Bruni, Satyabhoosun Gupt Domah, Felice Gaer, Abdoulaye Gaye, Jens Modvig, Sapana Pradhan-Malla, George Tugushi and Kening Zhang.

[1] Supplemented by submissions dated 29 August 2011 and 5 September 2011.

[2] Responsible for liaison and communications.

Staff of the Gambian National Army, Colonel Ndur Cham, ordered him to cut all the country's lines of communication. Fearful of the potential consequences of refusal, the complainant acted as instructed. However, the coup attempt failed and the President of the Gambia announced that all those involved would be severely punished. A good number of them were very quickly arrested.

2.2 Fearing possible reprisals on the part of the Gambian authorities, the complainant chose to desert. On 23 March 2006, while preparing to leave the country, the complainant gave his passport, bank book and a power of attorney over his bank account to his brother so that the latter would be able to transfer money from the complainant's account to his own account and the complainant would then be able to withdraw money overseas. On 27 March 2006, when the complainant's brother was attempting to make the transfer, the bank clerk noticed that the account holder was a member of the Armed Forces and alerted the National Intelligence Agency, which immediately came to arrest the brother. The brother was beaten and interrogated about the complainant's involvement in the coup attempt and his current whereabouts. The complainant's passport was confiscated. On 12 April 2006, a military arrest warrant for absence without official leave (AWOL) was issued against the complainant on the grounds of desertion.[3] The complainant's brother was detained until June 2007.

2.3 The complainant first found refuge in Senegal, where he remained until 12 April 2007. He then travelled to Switzerland, where he applied for asylum on 16 April 2007. On 26 April 2007 and 14 May 2007, the complainant was interviewed by the Swiss asylum authorities about the reasons for his asylum application and the circumstances of his flight from the Gambia. According to the complainant, both interviews were conducted in Wolof even though he had informed the Swiss authorities that his knowledge of this language was not good and that his mother tongue was Mandingo (Mandinka).[4]

2.4 At the time of the asylum proceedings, the complainant submitted his Gambian identity card, his military identification card and a certificate of basic military training. The Federal Office for Migration had the documents analysed in the laboratory of Zurich cantonal police, which concluded that the identity card and the military identification card had been tampered with.[5] The Federal Office for Migration therefore concluded that the documents were false.[6]

2.5 The Federal Office for Migration also identified inconsistencies in the details provided by the complainant concerning the date of the Gambian President's trip and the time at which the complainant apparently received the order from Colonel Ndur Cham to cut the lines of communication. The Federal Office for Migration has stated that, if the complainant were in real danger of being arrested or killed because of his involuntary involvement in the coup, after cutting the lines of communications, he would not have remained at the presidential palace until the morning of 22 March 2006, when the coup attempt had failed. Moreover, he would not have gone to the immigration office to obtain a new identity card following these events. According to

[3] On 5 September 2011, the complainant provided a copy of the warrant and explained that it was a document entitled "AWOL" (absence without official leave), an expression used in the Gambian armed forces to refer to a soldier who left his post without permission, which was usually issued after 21 days of unauthorized absence. The document in question states that the complainant has been absent from his post since 23 March 2006 and that he should be apprehended and taken to the military police under escort to face appropriate disciplinary action.

[4] The official language of the Gambia is English. Wolof, Mandingo, Fula, Serer and Jola are national languages.

[5] The photo on the identity card had been changed and the military identification card was forged.

[6] The State party submitted a copy of the certificate of military training with its observations on 6 March 2012. It considers the certificate to be authentic but to prove only that the complainant completed basic military training between September 2002 and January 2003.

the Federal Office for Migration, the copy of the military arrest warrant for absence without official leave (AWOL) provided by the complainant could easily have been falsified and the other items of evidence provided, such as the photographs of the complainant in military uniform and the press articles about the attempted coup, are not sufficient to substantiate his claims. Accordingly, on 4 September 2007, the Federal Office for Migration rejected the complainant's asylum application and asked him to leave Switzerland.

2.6 On 1 October 2007, the complainant lodged an appeal with the Federal Administrative Court on the grounds that his interviews had been conducted in Wolof, which is not his mother tongue, and that this was the reason for the contradictions identified by the Federal Office for Migration. He also clarified that he had remained at the presidential palace on the evening of the attempted coup not of his own volition; there had been a general restriction on movement that had prevented him from leaving. Furthermore, there was no risk involved in his visit to the immigration office to obtain a new identity card because he went in civilian attire and the immigration office has no connection with the army or the National Intelligence Agency. According to the complainant, the report issued by the police laboratory indicated that, in the absence of reference materials that could be used for purposes of comparison, it was not possible to demonstrate officially that the documents were falsified. Furthermore, the complainant provided explanations for the alterations to the two documents that the laboratory had identified. Specifically, he explained that he had had to reattach the photograph to his identity card as it had become unstuck and that he had cut the corners of his military identification card to trim it to the size of his wallet. He maintains that the documents that he submitted are authentic although they are in very poor condition. According to the complainant, before passing judgement on their validity, the Swiss authorities should have attempted to check their authenticity with their Ambassador in Senegal.[7] He notes that, in order to confirm his identity in the meantime, he provided a birth certificate which had been sent to him by his brother. The information he gave about the attempted coup in March 2006 and the organization of the Gambian National Army demonstrate both that he was involved in the coup and that he was a member of the army. He adds that, even without this information being taken into account, the fact that he deserted from the army would in itself be sufficient grounds for him to be tried for treason if he were to return to the Gambia. He notes that the Federal Office for Migration did not take this last point, and its possible consequences for the complainant, into account.

2.7 On 21 June 2011, the Federal Administrative Court issued a judgement ruling that the Federal Office for Migration, in its decision of 4 September 2007, had correctly evaluated the facts and the documents submitted by the complainant and that it had correctly concluded that the complainant had failed to substantiate the claims made in relation with his asylum application. The Court noted that the complainant's request that the Swiss authorities should make further attempts to verify his identity were not reasonable in the context of asylum proceedings. The Court therefore ruled that there was no evidence that the complainant would be in danger of being subjected to torture if he were returned to the Gambia and that the general human rights situation in the Gambia was not such as to prevent his deportation. It therefore asked the complainant to leave Switzerland before 27 July 2011.

2.8 On 12 July 2011, the complainant sent an e-mail to the African Commission on Human and Peoples' Rights, which has its headquarters in Banjul, the capital of the Gambia, in which he asked the Commission to confirm his identity, his military status and the circumstances of his flight. On 20 July 2011, in a document apparently drawn

[7] Switzerland does not have diplomatic representation in the Gambia and diplomatic and consular relations in this country are handled by its diplomatic representatives in Senegal.

up by the African Commission on Human and Peoples' Rights but containing no indication as to the capacity in which it was acting, the Commission indicates that it has checked with the Gambian Armed Forces and is able to confirm that the complainant was a member of the army and that he was involved in the attempted coup of March 2006. The Commission adds that if the complainant were to return to the Gambia, he would be subjected to torture and sentenced either to death or to life imprisonment for treason. On 27 July 2011, the complainant requested a review of the Court's decision on the basis of this information.

2.9 On 28 July 2011, the Federal Administrative Court issued a stay of the deportation order as a precautionary measure during the review process.

2.10 On 5 August 2011, the Federal Administrative Court ruled that the document from the African Commission on Human and Peoples' Rights did not constitute substantive evidence since it was a fax containing no indication of the sender and could easily have been falsified. Furthermore, the document had been submitted after the asylum proceedings without any satisfactory explanation as to why it had been submitted so late. The Court therefore annulled the stay of the deportation order that had been issued on 28 July 2011.

The complaint

3.1 The complainant claims that his forced return to the Gambia would constitute a violation of article 3 of the Convention because he fears that he would be tortured by the Gambian authorities on account of his involuntary involvement in the attempted coup of 21 March 2006 and his subsequent desertion.

3.2 The complainant also asserts that if he were returned to the Gambia, he would be tried for treason because of his involvement in the attempted coup on 21 March 2006 and/or his desertion and that he would then be sentenced either to death or life imprisonment without parole.

State party's observations on admissibility and the merits

4.1 On 6 March 2011, the State party submitted its observations on admissibility and the merits.

4.2 The State party recalls that, in order for the non-refoulement principle guaranteed under article 3 of the Convention to be applicable, the complainant must prove, in accordance with the Committee's guidelines, that he would be in personal, present and substantial danger of being subjected to torture if deported to his country of origin. It also recalls the considerations that must be taken into account in assessing whether such a danger exists — specifically, the existence in the country of origin of a consistent pattern of human rights violations, claims of torture or ill-treatment suffered in the past, political activities of the complainant, and whether there is evidence as to the complainant's credibility or inconsistencies in his claims.[8]

4.3 The State party notes that all these considerations were thoroughly analysed by the Federal Administrative Court during the asylum proceedings and that in the present communication the complainant provides no further evidence that might call the Swiss authorities' decision into question. The only new consideration is the claim that, if he were deported, the complainant would be immediately arrested and sentenced to death or life imprisonment without parole. The State party recalls in this regard that the protection afforded under article 3 of the Convention does not apply to persons in danger of being arrested and prosecuted and that the existence of such

[8] The State party cites general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22, in particular, paragraphs 6 and 8 of the general comment.

danger is insufficient grounds to conclude that the person is in danger of being subjected to torture.[9]

4.4 The State party recalls that the purpose of determining whether there is a consistent pattern of gross, flagrant or mass violations of human rights is to establish whether the complainant would be personally at risk of being subjected to torture.[10] It follows that the existence of such a pattern of violations does not in itself constitute a sufficient basis for concluding that the individual concerned would be in danger of being subjected to torture upon his return. It is also necessary that the risk is foreseeable, real and personal[11] and that it is assessed on grounds that go beyond mere theory or suspicion.[12] In this regard, the State party asserts that the Gambia is not in a situation of pervasive violence.

4.5 The State party maintains that the complainant never made any claim, either to the Swiss authorities or to the Committee, of having been tortured or ill-treated in the past in the Gambia. He simply claims that he is wanted by the Gambian authorities and that because of the nature of the acts of which he is accused, i.e. his involuntary involvement in an attempted coup in March 2006, he is in danger of being tortured. According to the State party, all these considerations have already been thoroughly analysed by the Swiss authorities. After a scientific analysis, the authorities concluded that the documents submitted by the complainant were either falsified or of uncertain origin and probably forged,[13] and, moreover, it had not been established that the complainant was wanted in his country of origin for the acts in question.

4.6 The State party notes that the complainant has made no claim of having been politically active either in his country of origin or in Switzerland.

4.7 According to the State party, the complainant has failed to provide a satisfactory explanation for the factual inconsistencies and contradictions in his claims that had been detected by the Swiss authorities, which undermines his credibility. The State party considers that the complainant has failed to prove that he was involved in the events in question and that, as noted by the authorities, his alleged conduct during the events was illogical and ran counter to their general experience. The State party adds in this regard that the complainant has provided contradictory information about his involvement in the attempted coup, stating first that he had not himself cut the lines of communication, then that he had cut the lines under orders, and finally that he had cut them on the direct order of the then Chief of the Armed Forces, who allegedly assisted him with the task.[14] Moreover, according to the State party, the complainant is unable to explain what his job of "signalling" at the presidential palace entailed and is likewise unable to describe the duties that he was supposed to perform. The State party concludes that all these considerations raise doubts as to the veracity of the

[9] The State party cites communications No. 57/1996, *P.Q.L. v. Canada*, Views adopted on 17 November 1997, para. 10.5; and No. 221/2002, *M.M.K. v. Sweden*, Decision adopted on 3 May 2005, para. 8.7.

[10] The State party cites communication No. 94/1997, *K.N. v. Switzerland*, Views adopted on 19 May 1998, para. 10.2.

[11] The State party cites communications No. 94/1997, *K.N. v. Switzerland*, para. 10.5, and No. 100/1997, *J.U.A. v. Switzerland*, paras. 6.3 and 6.5 et seq.

[12] The State party cites general comment No. 1 (1997), in particular, para. 6.

[13] The State party refers to the identity card and military identification card as if they are proven forgeries. It highlights the uncertain origin of the document supposedly drafted by the African Commission on Human and Peoples' Rights and the arrest warrant (AWOL), which are documents that are easy to falsify and easy to obtain in the Gambia and therefore have no evidentiary value for the State party.

[14] The complainant has not given an explanation for the contradictions noticed by the Swiss authorities during the asylum proceedings.

complainant's claims, particularly concerning the dangers he faced following the attempted coup of March 2006.

4.8 The State party concludes that, on the basis of the information before it, there is nothing to indicate that there are substantial grounds for fearing that the complainant would be at a real and personal risk of torture if returned to the Gambia. His claims and the evidence submitted give insufficient reason to believe that his deportation would expose him to a real, concrete and personal risk of being tortured, and his deportation would therefore not constitute a violation of article 3 of the Convention.

Complainant's comments on the State party's submission

5.1 On 4 May 2012, the complainant submitted his comments. He refutes the State party's argument that he would need either to have been tortured in the Gambia in the past or to have been politically active in order to qualify for protection under article 3 of the Convention. He maintains that it is sufficient to have well-founded fears of being subjected to torture in the event of refoulement to his country of origin.

5.2 He adds that the State party has unfortunately remained unconvinced of his credibility and the accuracy of his statements even though his explanations concerning the reasons for his departure and the circumstances of his flight have never changed. He provided authentic documents to prove his identity but the State party made no effort to check their validity with the Swiss Embassy in Senegal, as he asked it to do on several occasions. He recalls that he explained the minor inconsistencies identified by the authorities in his statements but that the authorities did not accept his explanations.

5.3 The author reiterates that, contrary to the State party's assertions, his return to the Gambia would indeed be a violation of article 3 of the Convention.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any complaint submitted in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee considers that the communication has been substantiated for purposes of admissibility, and the Committee notes that the State party has not contested the admissibility of the communication.

6.3 Accordingly, the Committee finds that no obstacles to the admissibility of the communication exist and thus declares it admissible.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information made available to it by the parties concerned, in accordance with article 22, paragraph 4, of the Convention.

7.2 The issue before the Committee is whether the removal of the complainant to the Gambia would constitute a violation of the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. The Committee must therefore determine whether there are substantial grounds for believing that the complainant would be in real, foreseeable and personal

danger of being subjected to torture if returned to the Gambia. In assessing this risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention.

7.3 The Committee recalls that, according to its general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable. The danger must nevertheless be personal and present. In this regard, in previous decisions the Committee has determined that the risk of torture must be foreseeable, real and personal. The Committee recalls that, under the terms of general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned, while at the same time it is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case. The Committee further recalls that, according to general comment No. 1 (para. 5), the burden of presenting an arguable case lies with the author of a communication.

7.4 The Committee notes that the complaint is related to the danger of the complainant being tortured by the Gambian authorities, who were said to be looking for him in connection with his alleged involvement in the attempted coup of March 2006. The Committee takes note of the length of time that has elapsed since this event and recalls that the main reason for considering the complaint is to establish whether the complainant would be in danger of being subjected to torture if he were returned to the Gambia.[15] The Committee notes that the State party questioned the involvement of the complainant in the attempted coup of March 2006 in view of the fact that his account of the events lacked credibility and he did not give any satisfactory explanation for the contradictions noted by the authorities of the State party during the asylum proceedings. He provided no additional evidence to the Committee in support of the claim that he was wanted by the Gambian authorities in connection with the coup attempt of March 2006[16] or that he was still wanted by them almost eight years after the events. The complainant also failed to offer any convincing argument for the authenticity of the documents that he had submitted to the Committee. In this context, the Committee considers that the complainant has failed to substantiate a present and personal risk of being tortured by the State authorities if returned to the Gambia.

8. The Committee, acting under article 22, paragraph 7, of the Convention, concludes that the complainant's removal to the Gambia by the State party would not constitute a violation of article 3 of the Convention.

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[15] Communication No. 61/1996, *X, Y and Z v. Sweden*, Views adopted on 6 May 1998, para. 11.2.

[16] The only document submitted in this respect is a copy of the AWOL military arrest warrant dated April 2006 (the authenticity of which is contested by the State party), which indicates that the complainant is wanted for desertion but not in connection with the attempted coup d'état.